IT IS ORDERED as set forth below:

Date: February 29, 2008

W. H. Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
JOSEPH SAMUEL TOLBERT LYNN ALLEN TOLBERT,	:	BANKRUPTCY CASE NO. 05-13134-WHD
Debtors.	:	
_____	:	
FULLOMOIE FALLA,	:	
Plaintiff,	:	ADVERSARY PROCEEDING NO. 06-1701
v.	:	
JOSEPH SAMUEL TOLBERT,	:	
Defendant.	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE

O R D E R

Before the Court is the complaint objecting to dischargeability of a particular debt filed by the Plaintiff, Fullamoie Falla (hereinafter the "Plaintiff") against the Defendant,

Joseph Tolbert, Jr. (hereinafter the "Debtor"). Following a trial on the complaint, the Court took this matter under advisement. The issues raised by the complaint constitute a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(I); § 1334.

FINDINGS OF FACT

The Debtor owned real property located at 8817-8819 Freedom Way, Jonesboro, Georgia (hereinafter the "Property"). The Property was subject to a deed of trust in favor of SunTrust Mortgage (hereinafter "SunTrust"). On March 12, 2003, the Plaintiff purchased the Property from the Debtor for $159,500. The Plaintiff transacted the sale of the Property through his real estate agent, LaShawn Parker, to whom he had granted a limited power of attorney. The Debtor accepted a down payment from the Plaintiff in the amount of $23,430.22 and financed the remainder for the Plaintiff.

From March 2003 through May 2005, the Plaintiff made regular mortgage payments to the Debtor.[1] The Debtor remitted those payments to SunTrust until January 2005. The Debtor maintained that, when he sold the Property to the Plaintiff, he disclosed to the Plaintiff, through Ms. Parker, that the Property was subject to a "wrap-around" mortgage whereby the Debtor would receive the Plaintiff's payments and remit them to the lender.

[1] Having considered the testimony of the parties, the Court finds that the Debtor did not receive mortgage payments from Ms. Parker following the foreclosure of the Property. The Court also finds that the Debtor did not receive the May mortgage payment.

However, in December 2004, the Debtor ceased making his monthly mortgage payments to SunTrust. The Debtor continued to accept mortgage payments from the Plaintiff in the months of January, February, March, and April 2005 without informing the Plaintiff or Ms. Parker that he would not be remitting the payments to SunTrust. Although the Debtor received notice from SunTrust that the Property would be foreclosed upon on the first Tuesday of May 2005, the Debtor never attempted to notify the Plaintiff or Ms. Parker that the Property would be foreclosed upon. SunTrust did in fact foreclose on the Property in May 2005.

On September 15, 2005, the Debtor filed a voluntary petition under chapter 7 of the Bankruptcy Code. On January 6, 2006, the Plaintiff filed the instant complaint, asserting that the debt owed by the Debtor to the Plaintiff arising from the sale, financing, and foreclosure of the Property is non-dischargeable in bankruptcy under section 523(a)(2), (4), and (6).

CONCLUSIONS OF LAW

The concept of discharging pre-existing debt forms one of the primary tenets of bankruptcy policy. Indeed, "a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.'" *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (citations omitted). At the same time, a separate equitable policy mandates that any

such mechanism for an unencumbered fresh start should only redound to the benefit of those debtors who are indeed unfortunate, yet honest. *Id*. at 286-87. Through the discharge exceptions set forth in section 523(a), the Bankruptcy Code offers a means of denying those individuals who do not qualify as "honest but unfortunate debtors" the benefits of a fresh start. *Id*. at 287. It is a long-standing principle of law, however, that discharge exceptions must be narrowly construed against the creditor and in favor of the debtor. *Gleason v. Thaw*, 236 U.S. 558, 562 (1915); *Schweig v. Hunter (In re Hunter)*, 780 F.2d 1577, 1579 (11th Cir. 1986).

In this action, the burden of proof lies with the Plaintiff, and he must prove by the preponderance of the evidence that the debt in question is not dischargeable. *Grogan v. Garner*, 498 U.S. 279, 287 (1991); FED. R. BANKR. P. 4005. Therefore, the Court must determine whether the Plaintiff has met his evidentiary burden as to the subsections of section 523 that form the gravamen of his Complaint.

A. *Section 523(a)(2)(A)*

The Plaintiff alleges that the debt owed to him is nondischargeable pursuant to section 523(a)(2)(A), which provides that a discharge under section 722 does not discharge an individual debtor of any debt to the extent the debt was obtained by "false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). To succeed under section 523(a)(2)(A), a creditor must establish by a preponderance of the evidence that:

(1) the debtor made a false representation with the purpose and intention of deceiving the creditor;

(2) the creditor relied upon the debtor's representation;

(3) such reliance by the creditor was justifiable; and

(4) the creditor suffered a loss as a result of that reliance.

See City Bank & Trust Co. v. Vann (In re Vann), 67 F.3d 277, 279-84 (11th Cir. 1995); *see also Grogan*, 498 U.S. at 285-90; *Signet Bank v. Keyes*, 959 F.2d 245 (10th Cir. 1992); *Mfr. Hanover Trust Co. v. Ward (In re Ward)*, 857 F.2d 1082, 1082 (6th Cir. 1988); *Hunter*, 780 F.2d at 1579.

In the case *sub judice*, as in most fraud cases, there is no direct evidence of fraudulent purpose or intent. Consequently, the intent or "scienter" element must be inferred from the totality of the evidence and the circumstances. *Kendrick v. Pleasants (In re Pleasants)*, 231 B.R. 893, 898 (Bankr. E.D. Va. 1999); *Kadlecek v. Ferguson (In re Ferguson)*, 222 B.R. 576, 585 (Bankr. N.D. Ill. 1998) (citation omitted).

The Plaintiff has asserted that the Debtor made a false representation by failing to disclose to him that the Property was subject to an existing mortgage and that the Debtor did not intend to pay off that mortgage. The Court agrees that, should the evidence support a finding that the Debtor concealed the existence of the mortgage, his "silence regarding [this] material fact can be a fraudulent misrepresentation under § 523." *In re Trombadore,* 201 B.R. 710 (D.N.J. 1996) (citing *In re Weinstein,* 31 B.R. 804, 809 (Bankr. E.D.N.Y. 1983);

In re Reitz, 134 B.R. 131, 133 (Bankr. D. Del.1991)). The Plaintiff would also be required to establish that the Debtor concealed this fact with the intent to deceive him.

Having heard the testimony of the Debtor, the Plaintiff, and Ms. Parker, the Court finds that the Debtor did not intentionally withhold this information from the Plaintiff. The fact that the Property was subject to an existing mortgage was stated clearly in the security deed prepared and executed by Ms. Parker at the closing. Even if Ms. Parker failed to see the reference to the lien in the security deed, the title report would have indicated to the Plaintiff the existence of the SunTrust mortgage. Even assuming that Ms. Parker was not aware of the existence of the SunTrust mortgage, the Court finds it unlikely that the Debtor, an experienced business man and investor in real estate, would have attempted to hide the existence of the mortgage. The Court finds that the Debtor did disclose to Ms. Parker the fact that he intended to sell the Property subject to a "wrap mortgage," and that he would be making payments to SunTrust on the existing mortgage as he received payments from the Plaintiff. The Debtor's testimony also supports a finding that the transaction was intended by both parties to provide the Plaintiff an opportunity to purchase the Property, subject to the SunTrust mortgage, with the goal of eventually obtaining permanent financing.

The Court also finds insufficient evidence to support any finding that the Debtor engaged in actual fraud. Nothing in the record supports the conclusion that, at any time prior to the closing of the sale of the Property, the Debtor had the subjective intent not to continue paying on the mortgage owed to SunTrust. The Court finds the Debtor's testimony to be

credible and sufficient to establish that he intended to accept mortgage payments from the Plaintiff and to remit them to SunTrust and that the unexpected financial distress from a failed business caused him to file a bankruptcy petition. This testimony is buttressed by the fact that the Debtor made the mortgage payments from the time of the closing in March 2003 until December 2004. In short, the Court finds no evidence to suggest that the Debtor engaged in misrepresentation, false pretenses, or actual fraud in order to persuade the Plaintiff to purchase and finance the Property. Having found that the Plaintiff has failed to meet his burden with regards to the first element of his claim, the Court finds no reason to address the remaining elements.

B. *Section 523(a)(4)*

Section 523(a)(4) of the Bankruptcy Code provides that "a discharge . . . does not discharge an individual Debtor from any debt . . . for fraud or defalcation while acting in a fiduciary capacity." 11 U.S.C. § 523(a)(4). For a debt to fall within this exception to discharge, the debtor must have acted as a fiduciary within the meaning of section 523(a)(4). Not all fiduciary duties will satisfy this requirement. "The Supreme Court has consistently held that the term 'fiduciary' is not to be construed expansively, but instead is intended to refer to 'technical' trusts." *Quaif v. Johnson,* 4 F.3d 950, 953 (11th Cir.1993) (citing *Davis v. Aetna Acceptance Co.,* 293 U.S. 328 (1934)). Courts have recognized three characteristics of a technical trust. *See Eavenson v. Ramey*, 243 B.R. 160 (N.D. Ga. 1999). First, a

technical trust "must exist prior to the act creating the debt and without reference to that act." *Id*. at 165; *see also Blashke v. Standard (In re Standard),* 123 B.R. 444, 453 (Bankr. N.D. Ga. 1991) (Bihary, J.). Second, the fiduciary duties associated with the trust must be specifically set forth so that the trust relationship is expressly and clearly stated. *See id*. Third, the trust must have a "separately identifiable res." *Id*.; *see also Matter of Snyder*, 184 B.R. 473 (D. Md. 1995) (citing *In re Baird,* 114 B.R. 198, 202 (9th Cir. BAP 1990)).

Presumably, the Plaintiff is arguing that the Debtor accepted the mortgage payments from the Plaintiff with the understanding that the payments would be held in trust by the Debtor and only used for the purpose of paying down the SunTrust mortgage. However, there is no evidence to establish that the Debtor and the Plaintiff had any agreement whatsoever as to the Debtor's obligations with regard to the Plaintiff's mortgage payments. Accordingly, the Court cannot find that the Plaintiff has carried his burden of establishing that an express trust existed over the mortgage payments. Accordingly, the Court must dismiss this Count of the Plaintiff's complaint.

C. *Section 523(a)(6)*

Section 523(a)(6) provides that any debt for willful and malicious injury by the debtor shall be nondischargeable. 11 U.S.C. § 523(a)(6). Such an injury can include an injury to a property interest held by another. *See Davis v. Aetna Acceptance Co*., 293 U.S. 328 (1934); *In re Wolfson*, 56 F.3d 52 (11th Cir. 1995); *In re Foust,* 52 F.3d 766 (8th Cir. 1995)

(knowing and fraudulent conversion of proceeds of creditor's collateral resulted in nondischargeable debt under section 523(a)(6)); *In re Pharr Luke*, 259 B.R. 426 (Bankr. S.D. Ga. 2000); *In re LaGrone*, 230 B.R. 900 (Bankr. S.D. Ga. 1999) (the act of conversion of property is an intentional injury contemplated by the exception to discharge).

To establish that a debt is one that arises from a willful injury, a plaintiff must show that the debtor had the specific intent to inflict the injury or that there was a substantial certainty that injury would result from the debtor's actions. *See In re Miller*, 156 F.3d 598 (5th Cir. 1998); *In re Moody*, 277 B.R. 865 (Bankr. S.D. Ga. 2001); *see also In re Hollowell*, 242 B.R. 541 (Bankr. N.D. Ga. 1999) (Murphy, J.). This standard is consistent with the United States Supreme Court's holding that, standing alone, a finding that the debtor's actions were voluntary is insufficient to support the conclusion that the debt is nondischargeable. *See Kawaauhau v. Geiger*, 523 U.S. 57 (1998) ("The word 'willful' . . . modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury,* not merely a deliberate or intentional *act* that leads to injury."). "Malicious means wrongful and without just cause or excessive even in the absence of personal hatred, spite, or ill will." *In re Neal*, 300 B.R. 86, 93-94 (M.D. Ga. 2003) (citing *In re Walker*, 48 F.3d 1161 (11th Cir. 1995)).

In this case, the Plaintiff has established sufficient facts to support a finding that the Debtor's failure to remit the mortgage payments to SunTrust resulted in a willful and malicious injury to the Plaintiff. When the Debtor accepted the Plaintiff's mortgage

payments in January, February, March, and April 2005, the Debtor was well aware that he would not be remitting the payments to SunTrust and that he would not pay be paying off the SunTrust mortgage. In essence, the Debtor permitted the Plaintiff to invest good money after bad to purchase the Property with the certain knowledge that the Plaintiff would lose these funds. The Debtor chose to accept the payments without even bothering to notify Ms. Parker that he did not intend to make any further payments on the SunTrust mortgage.

Accordingly, having considered the testimony of the Debtor, as well as his demeanor, the Court finds that the Debtor fully understood the natural consequences of his actions and simply did not care whether the Plaintiff had an opportunity to diminish the loss that he would undoubtedly suffer from the purchase of the Property. The Debtor proffered no excuse for his acceptance of ongoing mortgage payments. He simply testified that he was advised by his attorney to stop making payments on the SunTrust mortgage in contemplation of filing bankruptcy. However, this does not explain why he did not refuse or return the payments to the Plaintiff or why he did not make a greater attempt to explain the situation to Ms. Parker. This is not a just excuse that would prevent the injury suffered by the Plaintiff from being a malicious one. Accordingly, the Court finds that the injury caused by the Debtor's acceptance of the Plaintiff's January through April mortgage payments resulted in a willful and malicious injury to the Plaintiff – the loss of those funds.

The debt arising from this willful and malicious injury, however, is not the full amount sought by the Plaintiff. This is the case because the Plaintiff has failed to prove that

the Debtor's conduct was the proximate cause of the Plaintiff's entire loss. The Plaintiff has submitted no evidence to establish that, if the Debtor had told the Plaintiff that he was going to stop making the mortgage payments, the Plaintiff would not have suffered the loss of his equity in the Property. The Plaintiff did not establish that, if he had known about the Debtor's financial distress, the Plaintiff would have been able to refinance the SunTrust mortgage or to work out an arrangement with SunTrust that would have enabled him to save the Property. In fact, Ms. Parker testified that the sale was owner financed because the Plaintiff's credit prohibited him from qualifying for a traditional mortgage. No evidence of any change in the Plaintiff's credit was introduced. Accordingly, the Court cannot find that the Plaintiff has established by a preponderance of the evidence that the Debtor's conduct resulted in the loss of the Plaintiff's equity in the Property.

The proven damages caused by the Debtor's willful and malicious injury to the Plaintiff consist of the mortgage payments made by the Plaintiff in January through April 2005 which total $4,564.20.[2]

CONCLUSION

Having given this matter its careful consideration, the Court concludes that the

[2] The Plaintiff also seeks a nondischargeable award of reasonable attorneys fees incurred due to the Debtor's conduct. The Court notes that such an award may be justified if the plaintiff has a statutory or contractual right to such fees. *See TranSouth Financial Corp. of Florida v. Johnson,* 931 F.3d 1505 (11th Cir. 1991); *In re Alport*, 144 F.3d 1163 (8th Cir. 1998). The Plaintiff has presented no evidence, however, that the Plaintiff has such an entitlement to attorneys fees. Accordingly, the Court will award none.

Plaintiff has proven that a portion of his loss -- $4,564.20 -- is nondischargeable under section 523(a)(6). Accordingly, the Plaintiff's complaint is hereby **GRANTED in part and DENIED in part**. A judgment in favor of the Plaintiff will be entered.

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